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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. IRA DEAN JONES, JR., Defendant and Appellant.	2d Crim. No. B208612 (Super. Ct. No. F408092) (San Luis Obispo County)

Ira Dean Jones, Jr., appeals from the judgment following his conviction by jury of sexual penetration by a foreign object by force (counts 2 & 3); committing a lewd act on a 15-year-old child (counts 4, 6 & 7); and distributing harmful material to a minor (count 5). (Pen. Code, §§ 289, subd. (a)(1); 288, subd. (c)(1); 288.2, subd. (a).)[1] The jury acquitted him of committing a lewd act on a child under 14 years of age (count 1). (§ 288, subd. (a).) The court sentenced him to state prison for 21 years. Appellant contends that the court erred by admitting three videotapes into evidence, and by failing to give the jury a lesser included offense instruction. We affirm.

[1] All statutory references are to the Penal Code unless otherwise stated.

FACTUAL AND PROCEDURAL BACKGROUND

Prosecution Case

N.W., her younger sister, N., and their older sister, lived with P., their maternal grandmother. P. adopted the girls when they were very young and they rarely saw their mother. Each girl has a different father. Appellant is N.W.'s father, but he did not see her regularly for many years of her life. He was 42 years old in 2006.

Appellant lived with his mother in 2005, and until her death in February 2006. After his mother died, appellant stayed in P.'s home for several days. N.W. was then 15 years old and N., 11 years old. A short time later, appellant became a live-in caregiver for Trike, who required assistance with bathing, dressing, and other activities.

N.W. testified regarding several incidents that occurred in 2006, after the death of appellant's mother. The initial incident occurred in N.W.'s home. She fell asleep on the living room couch while watching television with appellant. When she awoke, she felt someone touching the inside of her thigh, rubbing it from her knee to her hip, and to her vagina. She opened her eyes, saw appellant, and feigned sleep until his hand reached her vagina. At that point, she pretended to wake up. She told appellant that she was going upstairs because the couch was not comfortable.

On another occasion, N.W. was alone with appellant in the car. He reached over, placed his hand down her pants, and touched her vagina with his fingers. He told her that he was sorry and did not mean to scare her. He also told her not to tell anyone and said that he would kill himself if she did tell anyone.

After appellant moved into Trike's house, N.W. sometimes went there to help him care for Trike. Appellant told N.W. to go into his room if she wanted to smoke. N.W. would stay in his room and watch television while waiting for him to call for help with Trike.

Appellant sometimes put a pornographic movie on the television while N.W. was in his room. Once, during a pornographic movie, appellant lay on the bed next to N.W., while they were both fully clothed, and rubbed his penis against her buttocks.

N.W. said that the movies were "always about young girls" and about adults in their "twenties" and "thirties."

Another time N.W. was on appellant's bed watching television when he put lubricant inside the "lips" of her vagina and touched them with his fingers. It hurt and felt wet. She gagged and went into the bathroom.

On another occasion, appellant put a strap or bracelet on one or both of her wrists and hooked the bracelet (or both of them) to a leather mechanism with metal rings that was on or near the bed. Appellant and N.W. were fully clothed and he lay on top of her, stomach to stomach. Appellant then weighed approximately 310 pounds. N.W. told him to stop or to get off.

On another day, appellant and N.W. were lying on the bed in his room at Trike's house. Appellant touched N.W.'s breast, under her clothing, with one hand while rubbing his penis with his other hand. He was breathing hard and N.W. thought that he was "jacking off."

On yet another occasion, appellant gave N.W. a backrub while she was fully clothed. He rubbed her back, then rubbed the back of her thighs, her vaginal area, and her buttocks. He told her not to "tell anyone about [his] massage."

For several months, N.W. never told anyone that appellant had molested her. She did not want to lose her father or cause him to kill himself. He was bigger than her and she did not feel she could refuse when he touched her.

In July 2006, appellant went to jail for possession of stolen property. He did not touch N.W. after that.

After the molestation began, N.W. tried not to think about it but she was depressed and cried often. P. tried to find out what was wrong and took her to see a doctor. Because N.W. was "very unhappy, very changed," P. also spoke with school officials who said that N.W. "wasn't communicating with anybody." She arranged for N.W. to attend a different school.

On April 28, 2007, N.W. was crying and could not stop. P. asked her: "Is your dad touching you?" N.W. answered: "'How did you know?'" N.W.'s "eyes got

huge," she "turned white" and stood there with a "look of horror" on her face. She described some incidents to P. On learning that appellant had molested N.W., N. said that he had also molested her.

Later, on April 28, P. called some of appellant's relatives to discuss the molestation incidents. One of the relatives was close to N.W., and others had young daughters. They came to P.'s home immediately. P. also reported the incident to the San Luis Obispo Police Department. Officer Larry Edwards arrived at P.'s home at approximately 10:00 p.m., to take an initial report, after appellant's relatives left.

Detective Russell Griffith of the San Luis Obispo Police Department organized a child abuse intervention team to investigate the charges. In searching a storage locker that appellant shared with his sister, Griffith found some yellow and gray leather wrist bands or bracelets with Velcro straps, two pornographic videotapes, two video boxes or covers with pornographic photographs on them, and a letter from N.W. to appellant. Griffith also found a "Lolita" videotape cover or box in the storage locker. Based on his training and experience, Griffith considered the Lolita videotape to be significant because it appeared to be for adult males who were interested in females between the ages of nine and fourteen. He had not ever watched Lolita.

On May 16, 2007, a prosecution child intervention interview specialist interviewed N.W. and N. In addition to discussing the incidents that she described at trial, N.W. told the specialist that appellant had tugged on her pants once, and his tongue was near her vagina. She thought he was trying to put his mouth on her vagina and she stopped him. (The jury viewed the tape of the interviews.)

On June 6, 2007, Dr. Nisha Abdulcader, a pediatric medical forensic member of the sexual abuse response team, examined N.W. Her examination neither confirmed nor negated the sexual abuse charges.

At trial, N. testified that appellant had molested her. She also said that he offered her $40 to let him lick her body.

Defense Case

Appellant denied that he had ever molested N.W. or N. He was not attracted to young girls. He and N.W. had minimal contact when she was younger. N.W. did not like his long-term girlfriend, Monica. Appellant broke up with Monica in 2002, moved back to San Luis Obispo, and began to see N.W. more. After his mother's death in February 2006, at N.W.'s request, he stayed at P.'s home.

During the time that appellant lived with Trike, he paid N.W. to clean Trike's house. He did not order her to go into his bedroom. N.W. smoked in appellant's bedroom because Trike had asked her not to smoke in the living room.

Appellant denied making the statements that N.W. and N. attributed to him. He denied that he had threatened to kill himself, or that he had offered N. $40 to lick her body. He sometimes gave N.W. back rubs when she was dressed, but never did so when they were alone.

The jury convicted appellant of all charges involving N.W. It acquitted him of the charge involving N.

DISCUSSION

Evidentiary Issues

Appellant contends that the court committed reversible error by admitting the Lolita and pornographic videotapes because (1) the prosecution failed to lay the requisite foundation, (2) the tapes lacked probative value under Evidence Code section 352, and (3) their admission violated the character evidence rule. He further contends that the admission of the Lolita videotape violated his right to protected free speech under the First Amendment, and constitutes reversible error. We disagree.

In challenging the evidence below, appellant cites Evidence Code section 352 considerations, relevancy and foundational issues. '" . . . The trial court has broad discretion in determining the relevance of evidence . . . . [Citation.]' Relevant evidence may nonetheless be excluded under Evidence Code section 352 at the trial court's discretion 'if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger

of undue prejudice, of confusing the issues, or of misleading the jury.'" (*People v. Richardson* (2008) 43 Cal.4th 959, 1000, 1001.) We apply the abuse of discretion standard in reviewing a trial court's evidentiary rulings. (*People v. Coddington* (2003) 23 Cal.4th 529, 587.)

In challenging the Lolita videotape, appellant stresses that Detective Griffith, who never saw the tape himself, testified that "[s]ome of the training classes . . . [described] *Lolita* [which concerns] adult males interested in female preadolescents somewhere between the ages of 9 to 14 years old," and explained that it was "something that would be suspicious," because it "talks about preadolescent females engaged in sex with adult males." In challenging the pornographic tapes, appellant notes that N.W. did not recognize the specific tapes and there was no foundation "that they had been shown to [her]."

The trial court did not abuse its discretion in admitting the Lolita tape and the pornographic tapes as probative evidence, given the nature of the charges against him. Appellant, a middle-aged man, was charged with molesting his 15-year-old daughter and her 11-year-old sister. As appellant acknowledges, the Lolita videotape concerns an illicit affair between a middle-aged man and his teenage stepdaughter. The tapes were found in a storage locker that appellant shared with his sister, along with the exercise bracelets and a leather mechanism with metal rings like those described by N.W. in her testimony.

Moreover, any error in admitting the tapes is harmless by any standard. Appellant admitted that he owned other pornography. The jury never viewed the tapes at trial. In contrast, it heard N.W. testify in explicit detail about multiple lewd acts appellant committed over a period of several months. The items recovered from appellant's storage locker corroborated parts of her testimony. N.W. testified that she was depressed and tried not to think about the molestation. P. observed and tried to address N.W.'s emotional decline during much of the same time period. The jury subsequently acquitted appellant of the charge involving N. That result belies any claim that the admission of the tapes was anything but harmless.

In view of our conclusion that any error in admitting the tapes was harmless, we do not address appellant's claims concerning the character evidence rule and his constitutional arguments regarding the Lolita videotape. Further, his related ineffective assistance of counsel claim is also not a ground for reversal. In order to obtain a reversal for ineffective assistance of counsel, appellant must show prejudice. (See *In re Sixto* (1989) 48 Cal.3d 1247, 1257.) For the reasons stated above, he has failed to do so here.

Lesser Included Offense Instruction

Appellant also contends that the court erred because it did not instruct the jury sua sponte that misdemeanor distribution of harmful material to a minor in violation of section 313.1 is a lesser included offense of felony distribution of harmful material to a minor in violation of section 288.2, subdivision (a). We disagree.

"'We apply the independent or de novo standard of review to the failure by the trial court to instruct on an assertedly lesser included offense. [Citation.] A trial court must instruct the jury sua sponte on a lesser included offense only if there is substantial evidence, "'that is, that a reasonable jury could find persuasive"' [citation], which, if accepted, "'would absolve [the] defendant from guilt of the greater offense' [citation] but not the lesser" [citation].' [Citation.]" (*People v. Licas* (2007) 41 Cal.4th 362, 366.) "[E]ven on request, a trial judge has no duty to instruct on any lesser offense *unless* there is substantial evidence to support such instruction. [Citation.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1008.) In deciding whether the evidence is substantial, the court considers "its bare legal sufficiency, not its weight." (*People v. Breverman* (1998) 19 Cal.4th 142, 177.)

Section 313.1, subdivision (a) provides: "Every person who, with knowledge that a person is a minor, or who fails to exercise reasonable care in ascertaining the true age of a minor, knowingly sells, rents, distributes, sends, causes to be sent, exhibits, or offers to distribute or exhibit by any means, including, but not limited to, live or recorded telephone messages, any harmful matter to the minor shall be punished as specified in Section 313.4." Section 288.2, subdivision (b) requires the

additional specific intent "of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of a minor, and with the intent, or for the purpose of seducing a minor . . . ." Misdemeanor distribution of harmful material to a minor in violation of section 313.1 is a lesser included offense of the felony distribution of harmful material to a minor in violation of section 288.2, subdivision (a). (See *People v. Jensen* (2003) 114 Cal.App.4th 224, 244-245.)

In this case, however, the court had no obligation to give the lesser included offense instruction. Appellant showed N.W. the pornographic videotapes while she was lying in his bedroom, where he also rubbed his penis against her buttocks. His conduct left no doubt that he intended to arouse, appeal to, or gratify the lust or passions or sexual desires of himself or N.W., and with the intent, or for the purpose of seducing her. There was no substantial evidence for a jury to conclude that appellant showed N.W. the pornographic videotapes without that intent.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

YEGAN, Acting P.J.

PERREN, J.

Michael L. Duffy, Judge

Superior Court County of San Luis Obispo

Diane E. Berley, under appointment by the Court of Appeal, for Defendant and Appellant.

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